

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DONALD ISAAC JOHNSON,

Plaintiff,

v.

STATE OF WASHINGTON et al.,

Defendants.

CASE NO. C12-5864 RBL-JRC

REPORT AND RECOMMENDATION

NOTED FOR:

NOVEMBER 30, 2012

The district court has referred this 42 U.S.C. § 1983 civil rights action to the undersigned Magistrate Judge pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B) and Local Magistrate Judge Rules MJR 1, MJR 3, and MJR 4.

The Court recommends that this action be dismissed without prejudice prior to service because plaintiff is challenging ongoing criminal prosecution and seeks to have charges dismissed (ECF No. 1, proposed complaint page 8). Plaintiff asked to proceed in forma pauperis and used the form for an inmate who is incarcerated (ECF No. 1). However, the address plaintiff supplied is in Dupont, Washington and does not appear to be connected to a jail (ECF No. 1).

1 The Court entered an order to provide additional information and plaintiff has responded (ECF  
2 No.3 and 4). Plaintiff states that he is still incarcerated (ECF No. 4). Accordingly, the Court  
3 granted in forma pauperis status as allowed pursuant to the Prison Litigation Reform Act. *See*, 28  
4 U.S.C. § 1915(a)(2).

5 The Court has reviewed the twenty-seven page narrative complaint. Plaintiff may not  
6 challenge ongoing criminal prosecution and the fact or length of his incarceration in a civil rights  
7 action. Therefore, this Court recommends that this action be dismissed prior to service and that  
8 in forma pauperis status be revoked for the purpose of appeal.

#### 9 DISCUSSION

10 In forma pauperis complaints may be dismissed before service of process pursuant to 28  
11 U.S.C. § 1915. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). A complaint is frivolous if “it  
12 lacks an arguable basis in law or in fact.” *Id.* at 325. Leave to amend is not necessary if it is clear  
13 that the deficiencies in the complaint cannot be cured by amendment. *Franklin v. Murphy*, 745  
14 F.2d 1221, 1228 n.9 (9th Cir. 1984). Plaintiff names the State of Washington and various local  
15 governmental entities as defendants (ECF No. 1, proposed complaint). Plaintiff also names as  
16 defendants the department of assigned counsel attorneys, prosecuting attorneys, and “Pierce  
17 County Superior Courts.” (ECF No. 1, proposed complaint). Plaintiff alleges that he was  
18 improperly arrested, transported to jail, and charged. He alleges that the charges must be  
19 dismissed because he claims that there is no “physical evidence” (ECF No. 1, proposed  
20 complaint). Plaintiff does not disclose what criminal charges are pending against him and instead  
21 he refers to Pierce County Court criminal cause numbers. Plaintiff demands release from  
22 incarceration and dismissal of charges throughout the twenty seven page rambling complaint. He  
23 also demands “Five Trillion Dollars” in damages (ECF No. 1, page 27).

1 If a plaintiff is challenging the very fact or duration of physical imprisonment, and the  
2 relief sought will determine whether plaintiff is or was entitled to immediate release or a speedier  
3 release from that imprisonment, plaintiff's sole federal remedy is a writ of habeas corpus.

4 *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

5 The United States Supreme Court held that "[e]ven a prisoner who has fully exhausted  
6 available state remedies has no cause of action under § 1983 unless and until the conviction or  
7 sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas  
8 corpus." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). The Court added:

9 Under our analysis the statute of limitations poses no difficulty while the state  
10 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]  
§ 1983 cause of action for damages attributable to an unconstitutional conviction  
or sentence does not accrue until the conviction or sentence has been invalidated.

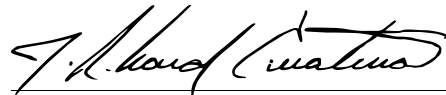
11 *Id.* at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be  
12 made based upon whether 'the nature of the challenge to the procedures [is] such as necessarily  
13 to imply the invalidity of the judgment.' *Id.* If the Court concludes that the challenge would  
14 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge  
15 must be brought as a petition for a writ of habeas corpus, not under § 1983." *Butterfield v. Bail*,  
16 120 F.3d 1023, 1024 (9th Cir. 1997) (*quoting Edwards v. Balisok*, 520 U.S. 641 (1997)).

17 Plaintiff seeks release from imprisonment and dismissal of pending charges. This action  
18 cannot proceed through civil rights and must be brought as a habeas corpus petition after a final  
19 state decision. The Court finds that amendment of the complaint cannot cure this defect.

20 Therefore, the Court recommends dismissal prior to service. Further, given the nature of this  
21 action the Court does not believe that plaintiff should be granted in forma pauperis status on  
22 appeal. The Court recommends revocation of in forma pauperis status for the purpose of appeal.  
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1 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
2 fourteen (14) days from service of this Report and Recommendation to file written objections.  
3 *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
4 purposes of de novo review by the district judge. *See* 28 U.S.C. § 63(b)(1)(C). Accommodating  
5 the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for  
6 consideration on November 30, 2012, as noted in the caption.

7 Dated this 7<sup>th</sup> day of November, 2012.

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10 J. Richard Creatura  
11 United States Magistrate Judge  
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